(2)

No. 85-1235

In The

Supreme Court of the United States

October Term, 1985

DAVID B. POYTHRESS, as Secretary of State, State of Georgia; MAX CLELAND, as successor Secretary of State, State of Georgia; GEORGE D. BUSBEE, Individually and as Governor of the State of Georgia; JOE FRANK HARRIS, as successor Governor of the State of Georgia; JESSE G. BOWLES; and HARDY GREGORY, JR., as Associate Justice, Supreme Court of Georgia,

Petitioners,

v.

ELIZABETH B. DUNCAN, ELIZABETH N. STOUT, and KATHLEEN KESSLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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16pp

QUESTION PRESENTED

Whether attorneys who proceed pro se should be treated like other attorneys (prevailing plaintiff's attorneys presumptively entitled to fees) for the purposes of 42 U.S.C. § 1988.

PARTIES

The parties are George D. Busbee, Individually and as former Governor of Georgia; Joe Frank Harris, Governor of Georgia; Jesse G. Bowles, former Associate Justice of the Supreme Court of Georgia; David B. Poythress, former Secretary of State of Georgia; Max Cleland, Secretary of State of Georgia; Hardy Gregory, Jr., Associate Justice of the Supreme Court of Georgia, as Petitioners/Defendants; and Kathleen Kessler as Respondent/Plaintiff. Plaintiffs Duncan and Stout no longer have an interest in this lawsuit as the relief sought under 42 U.S.C. § 1983 has been granted and their attorneys' fees paid by Respondents.

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Respondent respectfully prays denial of the petition for certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit *en banc*, entered on December 12, 1985.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988, pertinent part:

". . . In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

After representing prevailing parties in a lawsuit for an election necessary when Georgia's Governor appointed a successor Supreme Court Justice contrary to statute,[1] Attorney Kessler applied for fees pursuant to 42 U.S.C. § 1988.

Attorney Kessler represented Plaintiffs Duncan and Stout until time of trial. Plaintiffs and their attorneys then decided that it was important for Kessler to testify to a meeting with former Justice Bowles. The trial court would not allow Kessler to testify and also represent the other two plaintiffs. Kessler withdrew as attorney for Duncan and Stout, became a plaintiff, and testified as to uncontested matters.

Later on appeal and to date, Kessler represented herself in the litigation, appearing in this Court and on remand to the trial court as attorney for Plaintiff Kessler only.

[1]The Supreme Court has once reviewed this case on the merits and dismissed the State Defendants' writ of certiorari, POYTHRESS v. DUNCAN, 459 U.S. 1012 (1982).

At no time did Petitioners object to Attorney Kessler representing Plaintiff Kessler. No motion for disqualification was filed. The trial court also did not voice an objection, even though Attorney Kessler personally appeared before the court on remand representing herself.

The Petitioners/Defendants paid $128,000 to two other attorneys representing Plaintiffs, but protested Kessler's fees.

The question before this Court is whether a prevailing attorney/plaintiff representing herself is entitled to fees pursuant to 42 U.S.C. § 1988. The Eleventh Circuit in panel and *en banc* decisions said, "Yes."

REASONS FOR DENYING THE WRIT

I. Eleventh Circuit's decision is consistent with the only other circuit court decision on whether an attorney/plaintiff pro se may recover a fee under § 1988.

"Only one Court of Appeals, the Ninth Circuit, has considered the issue of whether a lawyer litigant proceeding pro se is entitled to attorney's fees under section 1988. *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980). The *Ellis* Court determined that defendants who were attorneys and who represented themselves were entitled to fees. Although *Ellis* is unlike the present case in that it concerned an attorney pro se defendant, the *Ellis* court's reasoning is, in large part, applicable to the present case. Indeed, *Ellis* was cited as persuasive authority in *Rybicki v. State Board of Elections*, 584 F.Supp. 849 (N.D.Ill. 1984) (three-judge court) where an attorney pro se plaintiff was granted

fees under section 1988. *But see Lawrence v. Staats,* 586 F.Supp. 1375 (D.D.C.1984) (attorney pro se plaintiff not entitled to fees).'"[2]

Eleventh Circuit Opinion [hereinafter "Opinion"], Petitioners' App. 5.

The cases cited by Petitioners all involve *non-attorney* pro se plaintiffs (frequently "jailhouse lawyers")[3] Even the non-attorney pro se cases recognize the distinction between attorney and non-attorney pro se plaintiffs for purposes of fee awards. See cases cited in Opinion, Petitioners' App. 6, n.8.

Petitioners' reasoning for putting all pro se litigants in the same category is "they do not need to hire an attorney to enforce their rights." Petitioners' brief, p.6. However, the financial need of the litigant is not the determinative factor in awarding fees under § 1988. *Blum v. Stenson,* — U.S. —, 104 S.Ct. 1541 (1984), *Johnson v. University College,* 706 F.2d 1205, 1210 (11th Cir.), cert. denied, 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983); *Riddell v. National Democratic Party,* 624 F.2d 539, 543 (5th Cir.1980); *Ellis v. Cassidy,* 625 F.2d 227,230 (1980).

"Moreover, contrary to the implication of defendants' argument, the fact that Kessler is a lawyer and therefore can (and did) provide legal representation to herself, does not mean that she does not need section 1988 in order to enable her to pursue a case like the present one. Merely because plaintiff Kessler need not pay an actual fee to attorney Kessler does not mean that she is able to spend the time and pay the overhead involved in this case, absent at least a hope

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[2]*Lawrence* relied on the trial court's decision in *Duncan v. Poythress,* 572 F.Supp. 776 (N.D.Ga.1983), now reversed, as authority to deny fees.

[3]The one exception is *Lawrence v. Staats.* See n.2, *supra.*

of remuneration. [Cite] In fact, preclusion of other employment by the attorney is one of the *Johnson* factors. *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d at 718."

Opinion, Petitioners' App. 8-9.

Petitioners have repeatedly failed to distinguish between prevailing party lawyer and layman. The two circuits to decide the issue in § 1988 fee cases have made such a distinction and are not in conflict.

As to part I, B of Petitioners' brief, no circuit court decision is cited, and there are none in conflict with the Eleventh Circuit's decision.

II. Eleventh Circuit's decision promotes the purposes of the fee act and the plain language of the act.

"[A] more general purpose of section 1988 is to encourage private citizens to vindicate important constitutional and congressional policies. [Cites]."

". . . 'The primary concern of Congress was to increase the level of competence with which such complaints are prosecuted. . . .' [*Duncan v. Poythress,*] 572 F.Supp. [776] at 778-79 . . ."

"In the case of an attorney pro se litigant such as Kessler, this congressional purpose is fulfilled. Kessler utilized a lawyer to pursue her claims; therefore, she utilized the kind of skilled advocate competent to pursue her legal claims, as evidenced by a license to practice law, that the framers of section 1988 envisioned."

Opinion, Petitioners' App. 9-10, 12-13.

Further, "[t]he plain language of section 1988 does not preclude an award of fees to a lawyer representing

herself." Opinion, Petitioners' App. 6-7. A member of the bar who advocates for the prevailing party and wins, is eligible for fees, as the statute does not exclude any class of attorneys. The Court of Appeals examined several arguments and found no justification for treating attorneys pro se differently from any other attorney under 42 U.S.C. § 1988. Opinion, Petitioners' App. 7-18.

III. No significant issue is presented in the writ for Supreme Court consideration.

A. The Court of Appeals correctly decided that the attorney/witness rule cannot logically apply to an attorney/plaintiff pro se.

Petitioners' concern that the Court of Appeals is overriding the advocate/witness rule is misplaced:

> "The ethical canons do not prohibit a lawyer from representing himself or herself [cites], and logic tells us that such a pro se litigant often testifies on his or her own behalf."

Opinion, Petitioners' App. 17-18, n.21.

Further, the advocate/witness rule applies to an attorney representing *another*,[4] not himself:

> " 'To apply DR 5-102 when the testifying advocate is a litigant in the action miscomprehends the thrust of the rule. DR 5-102 regulates lawyers who would serve as counsel and witness for a party litigant. It does not address that situation in which the lawyers *is*

[4]While it is customary for an attorney to have another person as a client, there is no prohibition against an attorney filling both capacities as attorney and client. See, e.g., 11 U.S.C. §§ 327(a) & (d), bankruptcy code, permitting "the court to authorize the trustee, if qualified, to act as his own counsel." House Report No. 95-595, 95th Cong., 1st Sess. 328 (1977).

> the party litigant.' . . . *Borman v. Borman,* 378 Mass. 775, 393 N.E.2d 847, 856 (1979)."

Opinion, Petitioners' App. 18, n. 21.

The advocate/witness rule cannot logically apply to a party representing himself.

Petitioners' ethical concerns come late in the case and are argued for the first time to the Eleventh Circuit on fee appeal. Opinion, Petitioners' App. 10, n.14.

The facts do not present a case for testing the advocacy/witness rule. It is not endangered by the Court of Appeals' decisions, which carefully considered and correctly disposed of this issue.

B. A case brought for the vindication of important constitutional rights is not evidence of a "cottage industry."

Duncan v. Poythress cannot be fairly characterized as a "cottage industry" situation. Plaintiffs were successful in obtaining an important constitutional right—the elective franchise—for all Georgians, which is the type of lawsuit § 1988 was intended to encourage. See, Opinion, Petitioner's App. 16.

Further, in order to be entitled to § 1988 fees, plaintiffs must have the skills to prevail. Their claims must be found meritorious. In *Duncan,* the trial court found plaintiffs' claims meritorious and expressly ordered attorneys' fees. Two of the three attorneys have been paid. Now the third attorney who worked alongside the other two attorneys is petitioning for fees in the same action. The case has not suddenly become a "cottage industry" action for purposes of denying fees to the third attorney.

The small number of cases concerning fees for attorney/plaintiffs under § 1988 shows that the attorney representing himself in § 1983 litigation is a very rare situation. The "cottage industry" theory is not supported by facts or the small number of attorney pro se cases. See, Opinion, Petitioners' App. 16.

C. "Jailhouse lawyers" and other non-attorney pro se parties will not receive fees by the Eleventh Circuit's decision.

Notwithstanding Petitioners' predictions,[5] *Duncan* specifically distinguished and did not overrule *Cofield* and other cases refusing fees to non-attorney pro se parties. *Cf. Duncan v. Poythress,* — F.2d — (Dec. 12, 1985) (Petitioners' App. 1-33) with *Cofield v. City of Atlanta,* 648 F.2d 986 (5th Cir. Unit B, 1981).

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CONCLUSION

Respondent respectfully prays denial of Petitioners' writ because the requirements for review by writ of certiorari are not present in the issues of this lawsuit:

(1) No circuit court is in conflict with the Court of Appeals' decision;

(2) No Supreme Court decision is in conflict with the appealed decision;

(3) The decision conforms to the language and purposes of the fee act, 42 U.S.C. § 1988;

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[5]Petitioners' brief, p.8, n.7.

(4) In practice, very few § 1983 attorney pro se cases exist. The legal issue involved is of concern to the parties and it is a matter for appellate policy, but it is not of such national significance as to require the attention of the United States Supreme Court.

Respectfully submitted,

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